

**PUBLIC HEARING OF THE PARLIAMENTARY JOINT COMMITTEE ON
THE INDEPENDENT COMMISSION AGAINST CORRUPTION (THE ICAC)
WITH FORMER INSPECTOR OF THE ICAC, MR GRAHAM KELLY.**

RESPONSES TO INDICATIVE QUESTIONS ON NOTICE

Inspector of the ICAC 2007-08 Annual Report

Preliminary observations

1. The Annual Report outlines (p2) your view that the definition of corrupt conduct should be revisited, as it results in too many trivial complaints to the ICAC.

- a. What specific changes to the definition of corrupt conduct would you propose?*
- b. In his review of the ICAC Act Mr McClintock SC expressed concern that such a change would alter and possibly limit the Commission's investigatory jurisdiction. Do you share these concerns?*
- c. In your view, how could a narrower definition be drafted to avoid the exclusion of certain types of conduct from the ICAC'S jurisdiction?*
- d. Have you discussed these matters with the Commissioner, and, if so, does he concur with you?*

I will respond to sub-questions a. to d. collectively.

I note that my views on the issues raised by these questions were discussed during the course of my meeting with the Parliamentary Joint Committee (the PJC) on 1 December 2008. I have no further comments that I wish to make except to reiterate my view that there should be a 'tiered system' applied in respect of complaints permitted to be made to the ICAC by various classes of potential complainants.

Under this tiered system members of the public would only be allowed to make complaints to the ICAC if such complaints satisfied fairly high threshold criteria for serious or systemic corrupt conduct.

Public officials or public agencies would be able to make complaints to the ICAC under a broader scope as they would be expected to be in a more informed position on appropriate matters to be reported to the ICAC.

The ICAC itself should retain broad discretion to initiate its own enquiries and investigations into possible serious and systemic corrupt conduct as it sees fit. The

effect of this tiered system would be to reduce the pressure placed on the ICAC by having to deal with trivial or irrelevant complaints from members of the public, which comprise a significant proportion of the large number of complaints it receives each year. This approach would enable the ICAC to devote greater resources to effectively targeting potentially serious and systemic corrupt conduct.

2. Parliament's intention when creating the office of Inspector was to fill a gap in the accountability of the ICAC by establishing an office that would be responsible for investigating complaints about possible abuses by the ICAC of its powers. In the Annual Report you express the view that the Inspector's role should focus more on performance monitoring, rather than complaints handling (p2) and propose the ICAC Act be amended to enable the Inspector to carry out performance reviews of the ICAC against agreed benchmarks.

- a. Why do you consider that the low level of complaints received to date about the abuse of power by the ICAC changes the need to have the Inspector primarily focused on assuring the ICAC's method of operations are proper and in compliance with legal requirements?***

It is not being suggested that the Inspector's focus on assuring that the ICAC's method of operations are proper and in compliance with legal requirements should be removed. However, after three years of undertaking duties as Inspector, it appears to me that the Inspector's role could be enhanced by adding a performance monitoring function which would result in a report to the Parliament on management issues which affect the ICAC's operations.

This proposed function would complement the Inspector's current functions to enable the Inspector to better answer the key concern that appears to underlie the Parliament's intention in creating the Inspector's role, i.e. to ensure that the ICAC was discharging its statutory duties as effectively as possible.

- b. Why do you consider the Inspector's office to be an appropriate vehicle for performance review of the ICAC?***

I do not say that the Inspector's office currently has the expertise to personally undertake a performance review function itself or to the extent that it might in future, in all relevant areas. However, the Inspector's office is the appropriate vehicle to supervise any such review as the Office is the only body with experience in reviewing the operations of the ICAC and has developed a body of knowledge about the ICAC. The actual function of carrying out a performance review would be conducted by engaging suitably qualified personnel to assist the Inspector.

- c. Do you see any potential for such a performance monitoring role to undermine the independence of the ICAC, including the independence of the Inspector?***

No on both counts, as the Inspector's function in respect of performance monitoring would not be binding in any respect. Under my proposal, the purpose of this function would be to make comments to the New South Wales Parliament for its consideration.

3. You express the view that effective accountability is best served by a more integrated approach, instead of the current narrow focus on compliance with the law.

a. Is it your view that the existing accountability mechanisms for oversight of the ICAC should be completely restructured?

No, as stated in response to the above question, it is being suggested that the Inspector's existing functions should be added to, in order to improve accountability.

b. Given that under the ICAC Act the Committee has jurisdiction to monitor and review the Commission's exercise of its functions, would your proposal create an overlap in the jurisdiction of the Inspector and the Committee?

No, as the Committee does not have the capacity to undertake a specific performance review of the ICAC.

4. In previous evidence to the Committee you have indicated that you would undertake more audit work in relation to the ICAC's use of its own powers, if funds were available to facilitate more audit programs. Did you have an opportunity to formulate an enhanced audit program and seek supplementation for it prior to the end of your term?

No.

5. You recommend that a sunset clause review of the Inspector's function be undertaken towards the end of the current Inspector's three year term (p3). Presumably, the sunset clause review would be with an outlook to abolish the Office of the Inspector if it was no longer seen to be required.

a. What factors do you think should be weighed up in making a decision as to the value and ongoing need for the Office of the Inspector?

The following factors, listed in no particular order, could be considered and is not provided as an exhaustive list:

- Improved accountability of the ICAC including a better understanding of the criteria it uses to fulfil its statutory objectives;
- The overall 'cultural impact' on the ICAC in terms of care exercised in use of its extensive powers; and
- The Inspectorate being seen as providing value for money.

b. How do you measure the value of a specific accountability mechanism such as the Inspector provides?

The value of the Inspector's role should be measured both in qualitative and quantitative terms as appropriate to different factors being weighed up. Also see my response to clause (a) above.

6. *You comment that the legislation should make clear the Inspector's discretion to decide how and to whom the Inspector's complaint reports can be published (p3).*

a. *Given that the ICAC Act is silent on the extent of the Inspector's discretion to report, why do you consider there to be a need to expressly provide for such discretion?*

In his Annual Report 2007-08 to the Parliament of New South Wales, the Inspector of the Police Integrity Commission, His Honour Peter Moss QC, expressed his view that the legislation which governs his role and functions, namely, the *Police Integrity Commission Act 1996*, was unclear on whether he, as Inspector, could publish reports concerning complaints. Mr Moss noted in his Annual Report that the legislation governing the Inspector of the ICAC in respect of publication of reports concerning complaints was identical to his on this issue and therefore it was also unclear as to whether the Inspector of the ICAC had the power to publish reports concerning complaints.

To date I have taken the view that the Inspector of the ICAC has a discretion to publish reports, and have done so where I have considered it appropriate. However, I note the comments made by such an eminent and experienced judicial officer such as Mr Moss.

Whether my approach to date on this issue has been correct or not, in any event it is highly unsatisfactory that the legislation should be silent on the issue and leave open any scope for ambiguity. The power to publish reports concerning complaints is, in effect, a key mechanism for holding the ICAC accountable. It is likely that any ambiguity will be tested in the most heated of circumstances through litigation, for example, where the Inspector wishes to publish a report concerning a complaint which the ICAC may not want to have published because the report contains comments adverse to the ICAC and its officers.

It is also likely that parties to such litigation will not accept a single decision and that a first instance decision will be appealed to higher courts in order to decisively determine a very important and sensitive issue, i.e. does the Inspector have the right to publish reports concerning complaints?

Such litigation will be a burden on the public purse and would inevitably delay the publication of the particular report which has triggered the litigation. Such delay may have the effect of denying justice to those who may have been adversely affected by the ICAC's conduct and for whom the timely substantiation of their complaint is a significant issue.

Additionally, if the final outcome of any such litigation is that the Inspector is found by a court not to have the power to publish reports, such a finding would make nonsense of a key purpose of the Inspector's role which is to hold the ICAC accountable by making public comments on its conduct. From a policy perspective, it is also highly unsatisfactory that this issue should be left to the courts to determine rather than the Parliament itself.

I note that in respect of the report concerning the complaint made by Mr Breen in order to avoid any uncertainty arising from this issue I took the step of ensuring that the report was published pursuant to s77A of the ICAC Act.

- b. You have reported on the Breen matter utilising the reporting provision under s.77A. Did you encounter any particular problems when reporting on this complaint investigation?*

The uncertainty surrounding whether or not the Inspector could publish the 'Breen Report' contributed to a delay in the publication of the report, albeit not a significant one so that the report could be presented when Parliament was sitting, pursuant to s 77A. Although the delay did not affect the issue of accountability in this instance, it may well do so in other circumstances where the issues contained in such a report are more contemporary and relevant to ongoing events.

- c. In what circumstances do you envisage that your ability to report on complaint investigations would be fettered in any way under the current legislation?*

Please see my response to clauses (a) and (b) above.

- d. Reports to and by the Inspector of the ICAC are covered by the provisions of the Defamation Act. Do you see a need for any other protections?*

The key protection that needs to be provided to the Inspector is to remove any ambiguity about the Inspector's power to publish reports concerning complaints.

The ICAC Act should be amended so that it contains a specific and clear reference enabling the Inspector to publish reports concerning complaints. The amendment should not restrict the Inspector's discretion as to whom such reports can be published.

There is a real question as to whether the Defamation Act provides protection to the Inspector if the Inspector is found by a court to have acted beyond power, i.e. if the Inspector has published a report concerning a complaint, particularly one containing adverse comments, and there is a subsequent judicial ruling that the publication of such a report by the Inspector was beyond the Inspector's power.

Complaints received

- 7. The Committee is having difficulty interpreting the Inspectorate's statistics in relation to the total number of complaints received. Table 1 on page 11 of the Annual report states that a total of 57 complaints were received in 2007-2008. The following section of the report (pp15-27) outlines complaints received during the period. This section details a total of 43 complaints received in 2007-2008 that were finalised (p15-23) and 19 complaints received that are yet to be finalised (p24-27). Therefore, a total of 62 finalised and not finalised complaints are outlined in this section, while the total number of complaints received as per Table 1 is 57. How many complaints were received in total during 2007-2008?*

There is an error in the Table on page 11 with respect to the total number of complaints received in 2007-08 being stated as being 57. The correct number for the total number of complaints received in 2007-08 was 62. The error came about as a result of the number 57 as contained in the table on page 11 of the 2007-08 Annual Report not being updated prior to the Annual Report being finalised for publication.

A correction note on this issue will be contained in the Inspector's Annual Report 2008-09.

8. *Page 14 of the report refers to a complaint made by a former ICAC employee. The report notes that the ICAC did not implement the Inspector's recommendations in relation to this matter.*

a. *What recommendations were made to the Commission in the draft report on the investigation of this matter?*

Two recommendations were made. The first was that a written assurance to the complainant should be made in respect of relevant issues raised by the complaint. The second recommendation was that the ICAC could clarify, in the form of guidelines, the scope and application of s.111 of the ICAC Act.

b. *Is the former Inspector satisfied with the Commission's response to his recommendations in relation to this matter?*

No.

9. *The report notes that the Inspector does not have the power to enforce the recommendations that he makes (p15).*

a. *Does the Inspector have any comments on the implementation of the Inspector's recommendations to the ICAC?*

No, as the monitoring of any such implementation is not within the Inspector's role and functions.

b. *Why should the Inspector's recommendations be binding on the ICAC?*

I do not say that it should.

Inspector of the ICAC's report of an audit of the ICAC's compliance with the Listening Devices Act 1984 (June 2008)

Framing the terms for audit

1. In your report you noted that the draft terms of reference for the audit were amended following discussions with the Commission and a preliminary review of the relevant files (p6). The amendments clarified the scope of the audit, the methodology to be used and the outcome of the assessment.

a. Can you please indicate to the Committee what clarifying amendments were made to the audit's scope and methodology?

The amendments were of a minor nature in the following respects, firstly to add that the Inspector would examine any other relevant or applicable laws and second stating that the Inspector or the Office of the Inspector of the ICAC (the OIICAC) would hold discussions with ICAC officers where it was considered relevant or appropriate to do so.

b. How was the outcome of the assessment amended?

This was a minor clarifying amendment.

The draft terms of reference did not indicate what would be the outcome of the audit. The final terms of reference stated that the outcome of the audit would be to assess the extent to which the ICAC complied with the *Listening Devices Act 1984*.

Methodology and results

2. How did you determine which warrants were to be included in the audit?

The nature and type of warrant applications made by the ICAC over a three year time period from January 2004 to the relevant current period at the time of consultation with the ICAC in 2008, which was April 2008, was discussed between the OIICAC and relevant ICAC staff.

Views expressed from these discussions led the Inspector to form the view that approximately 30% of warrants applied for each year from 2004 would constitute a fair audit sample, reflecting a diverse number of complaints investigated in which such warrants were applied for and obtained.

3. The audit sought to establish the ICAC's compliance with the requirements of the Act by assessing applications for listening device warrants that were granted by judicial officers.

a. Were any applications refused?

No.

- b. If so, would the consideration of refused applications have aided the audit process?***

Not applicable.

4. The audit only focussed on the ICAC's compliance with part 4 of the Act (p13) Did you consider assessing whether the Commission complied with the provisions in part 5 relating to the destruction of irrelevant records made by the use of a listening device?

Yes, this was considered and the process of compliance with part 5 was discussed with the ICAC. It was decided, however, not to focus on this issue in terms of priority and available resources.

5. The report states that the audit included a review of the Commission's 'compliance with other laws, relevant to an exercise of powers pursuant to the Listening devices Act'.

- a. Was ICAC's compliance with any other laws assessed as part of the audit?***

No.

- b. If so, what were the results of the assessment?***

Not applicable.

6. In relation to section 16A, which deals with the retrieval of devices after a warrant has expired, your report states (p13) that there was no specific information in relation to the retrieval of a listening device.

- a. Does this refer to a particular device, or to all devices for which for which warrants were granted and audited by the Inspector?***

All devices. The above statement is a reference to the fact that there was no specific information available as to when listening devices were retrieved by the ICAC, i.e. no dates and times were given.

- b. How were you able to assess the Commission's compliance with this section if no material or information was provided by the ICAC to indicate whether listening devices were retrieved?***

I refer to my comments made in the first paragraph on page 14 of the report which, in summary, states that the ICAC advised that in respect of all the warrants audited, only one warrant was not retrieved during the period authorised the warrant or in accordance with the exceptions permitted under s16A (1) and (2).

My comments in the audit report also note that the ICAC had advised that in respect of that one warrant, that prior to the expiry of the 10 day period (permitted under s16(2)) it had applied to the Supreme Court for an extension of time in which to retrieve the

listening device and had been granted the extension. The audit report notes that the ICAC advised that it had subsequently provided a report to the Supreme Court on the retrieval of this particular listening device pursuant to s19(4).

The ICAC's advice and the examination of reports made by the ICAC pursuant to s19(1) on the execution or non-execution of the warrant, led me to conclude that all listening devices for warrants audited had been retrieved in accordance with the requirements of the *Listening Devices Act 1984*.

- c. Were you satisfied with the material provided by the Commission, in terms of its compliance with this section, given that the Commission did not provide you with its report regarding the retrieval of a device under section 19(4)?*

Yes. I accepted that the ICAC provided me with truthful and correct advice.

Publication of final audit report

7. In terms of subsection 19(2), which allows for a judge to direct that the record of evidence or information obtained through the use of a listening device be brought before the Court, the audit states that no documentation was available to indicate whether any of the audited warrants were the subject of such a direction. Your audit indicates (p16) that the ICAC undertook to advise on this issue and that its advice would be included in the final audit report.

- a. Is it your intention to publish a final audit report?*

No. Page 16 of the Inspector's Annual Report 2007-08 reported on and finalised this issue.

- b. If so, when will you be publishing the final audit report?*

Please see answer referred to in clause (a) above.

- c. If not, how will you report on the ICAC's advice in relation to this issue?*

Please see answer referred to in clause (a) above.

Relevant ICAC policies and procedures

8. The report states that ICAC policies and procedures (listed on p10) on obtaining and executing listening device warrants were reviewed as part of the audit.

- a. What was the outcome of the review of these procedures?*

The procedures were reviewed to understand the process by which warrant applications were prepared and were not examined as a separate review of the procedures themselves.

- b. In terms of the warrants audited, did ICAC officers comply with the relevant ICAC policies and procedures?***

Discussions with ICAC officers led the OIICAC to understand the procedures were complied with in the preparation of warrant applications. I accepted this advice.

Repeal of Act

9. The Listening Devices Act 1984 was repealed pursuant to the Surveillances Devices Act 2007, which commenced on 1 August 2008. This superseding Act was assented to on 23 November 2007, before your audit commenced.

- a. Do you have any recommendations for your successor as Inspector, should he decide to undertake an audit of the ICAC's compliance with the new Act?***

I have had general discussions with Inspector Cooper about the audits, including about methodology. Beyond that I do not think it is appropriate for me to make any specific recommendations to him on any particular audit which he may wish to undertake unless he specifically invites me to do so.

- b. In particular, would you have any comments in terms of the methodology that could be used for assessing compliance with the provisions of the new Act?***

No. See my answer to clause (a) above.